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84-1924

NO.

in the
Supreme Court
of the
United States

October Term, 1984

CITY OF POMPANO BEACH,

Petitioner,

vs.

RICHARD MAYNARD CAPALBO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA AND APPENDIX

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QUESTION PRESENTED

The petitioner, a municipal corporation, charged the respondent herein with violating a section of the municipal code which prohibits any person from lodging or sleeping in a vehicle, on a public street, public right-of-way or public parking lot. The respondent challenged the ordinance on the grounds of vagueness and overbreadth, contending that he was deprived of his due process rights secured to him by the Fourteenth Amendment to the U.S. Constitution.

The state courts held that the ordinance was unconstitutional, therefore, the question presented is:

> Whether a proscription on sleeping in a vehicle on a public street, public right-of-way or public parking lot is unconstitutionally vague, and is such a proscription overbroad when it sweeps within its ambit "innocent conduct" which a municipality has a right to regulate?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTE (ORDINANCE) AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. This Case Should Be Reviewed Because It Presents The Question To What Extent A Municipal Government May Regulate The Conduct Of Its Citizens Under Its Police Power Before Such Regulation Becomes Overburdensome and Oppressive	6
A. A Municipality Has A Substantial Governmental Interest In Regulating Where A Person May Sleep	6
B. An Ordinance Which Gives Fair Notice Of The Type Of Conduct Which Is Prohibited Is Not Void For Vagueness	8

TABLE OF CONTENTS (Continued)

Page

CONCLUSION 10

APPENDIX:

Denial of Certiorari by the Florida Supreme Court dated January 17, 1985 ..... App. 1

Opinion of the Fourth District Court of Appeal, dated August 7, 1984, and dissent ..... App. 3

Opinion on Motion for Rehearing of the Fourth District Court of Appeal ..... App. 14

Mandate and Opinion of the Circuit Court, Seventeenth Judicial Circuit, Broward County, Florida (Mandate dated December 6, 1982, Opinion dated September 23, 1982) ..... App. 18

Order of Judge Nutaro of the County Court, Broward County, Florida dated April 8, 1982, with Defendant's Motion to Dismiss, dated March 4, 1982, which was incorporated ..... App. 21

TABLE OF AUTHORITIES

Cases	Page
United States Supreme Court:	
Clark vs. Community for Creative Non-Violence, ____ U.S. ____, 104 S.Ct. 3065 (1984)	5, 7
Erznoznik vs. City of Jacksonville, 422 U.S. 205 (1975)	3
Hygrade Provision Company vs. Sherman, 266 U.S. 497 (1925)	9
John P. King Manufacturing Company vs. City Council of Augusta, 277 U.S. 100 (1928)	3
Kolender vs. Lawson, 461 U.S. 352 (1983)	4
Papachristou vs. City of Jacksonville, 405 U.S. 156 (1972)	4
Rose vs. Locke, 423 U.S. 48 (1975)	9
United States vs. Harris, 347 U.S. 612 (1954)	4, 8, 9

TABLE OF AUTHORITIES (Continued)

Cases	Page
Other Federal Cases:	
Lazarus vs. Faircloth, 301 F.Supp. 266 (S.D. Fla. 1969)	5
State of Florida Cases:	
City of Pompano Beach vs. Capalbo, 455 So.2d 468 (Fla. 4th Dist. Ct. App. 1984) *Cert. den.* No. 66080, (Fla. Jan. 17, 1985)	2
United States Constitution:	
U.S. Constitution	3, 9
Federal Statutes:	
28 U.S.C. §1257(2)	3
28 U.S.C. §1257(3)	2
State Statutes/City Ordinances:	
City of Pompano Beach Municipal Code, Section 31.66	3

NO.

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October Term, 1984

CITY OF POMPANO BEACH,

Petitioner,

vs.

RICHARD MAYNARD CAPALBO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

Petitioner, the City of Pompano Beach, respectfully prays that a writ of certiorari issue to review the judgment of the Fourth District Court of Appeals of the State of Florida entered in the above matter.

OPINIONS BELOW

The opinion and order of the Fourth District Court of Appeal of the State of Florida have been reported at 455 So.2d 468 (1984). For the Court's convenience, they are reprinted in the Appendix hereto (A1, A2), along with the dissenting opinion of Judge Hurley; the opinion and order of that court on Petitioner's Motion for Rehearing have also been reported at 455 So.2d 468 (1984), and are reprinted in the appendix hereto at (A6).

The opinion and order of the Circuit Court of the Seventeenth Judicial Circuit Court in and for Broward County, Florida, (sitting in its appellate capacity) per the Honorable Harry G. Hinckley, Jr., are reprinted in the Appendix at (A8) as is the opinion and order of the County Court of Broward County, Florida, filed by the Honorable Constance Nutaro, at (A11).

JURISDICTION

The Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida affirmed the judgment of the trial court by mandate on December 6, 1982, (opinion rendered September 23, 1982). District Court of Appeals of the State of Florida denied a petition for Writ of Common Law Certiorari on August 8, 1984 and denied a Motion for Rehearing on September 26, 1984. The Supreme Court of Florida denied a petition for writ of certiorari on January, 1985. This Court has jurisdiction under 28 U.S.C. §1257(3) to review the final judgment rendered by the highest court of the State of Florida where a decision could be had, which judgment draws

in question the validity of a state statute[1] on the ground of its being repugnant to the Fourteenth Amendment of the U.S. Constitution.

STATUTE (ORDINANCE) AND CONSTITUTIONAL PROVISIONS INVOLVED

The ordinance involved is section 31.66 of the City of Pompano Beach Municipal code which provides:

> It shall be unlawful for any person to lodge or sleep in, on or about any automobile, truck, camping or recreational vehicle or similar vehicle in any public street, public way, right-of-way, parking lot or other public property within the limits of the city.

This case also involves the due process provisions of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On September 12, 1981 at 2:55 A.M.. a Pompano Beach police officer saw the respondent, Richard M. Capalbo, sleeping in an automobile which was parked

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[1]This Court has recognized that a local ordinance is deemed a state statute for purposes of invoking the jurisdiction of U.S. Supreme Court to review the validity of a state statute which has been assailed as unconstitutional. *Erznoznik vs. City of Jacksonville*, 422 U.S. 205 (1975), *John P. King Manufacturing Company vs. City Council of Augusta*, 277 U.S. 100 (1928). While those cases dealt with 28 U.S.C. §1257(2), as opposed to subsection (3), the same rationale would apply.

in a public parking lot. The respondent was arrested and charged by municipal information with violating section 31.66 of the municipal code.

Prior to trial, the respondent moved to dismiss the information on the grounds that the subject ordinance was facially vague and overbroad and encouraged arbitrary enforcement. The County Court granted the respondent's motion, holding the ordinance unconstitutional.

On appeal, the Circuit Court affirmed, stating that while the ordinance was "not overly vague or ambiguous" it placed "too great a burden on our law enforcement officers and our citizens alike for uniform enforcement". The City thereafter filed a petition for Writ of Certiorari in the Fourth District Court of Appeal for the State of Florida.

In denying the petition (Hurley, J., dissenting) the panel held that the ordinance was both unconstitutionally vague and overbroad under the standards enunciated in *United States vs. Harris*, 347 U.S. 612 (1954), *Papachristou vs. Jacksonville*, 405 U.S. 156 (1972), *Kolender vs. Lawson*, 461 U.S. 352 (1983) and others (A3). Specifically, the State Court decided that "while the ordinance gives ample notice of the conduct that is proscribed" it is "void for vagueness because it leaves in the unbridled discretion of the police officer whether or not to arrest one asleep in a motor vehicle on a public street or way or in a parking lot". (A4) The Court went on to cite a number of exceptional

circumstances where the ordinance could—if read literally—apply.[2]

Similarly, the ordinance was held to be constitutionally infirm on overbreadth grounds in that it "criminalizes conduct which is beyond the reach of the city's police power inasmuch as [the proscribed] conduct in no way impinges on the rights or interests of others. *Lazarus vs. Faircloth*, 301 F.Supp. 266, 272 (S.D. Fla. 1969)." That is, the city may not, under its police power, regulate where a person may sleep.

On petition for rehearing, the city argued that the case of *Clark vs. Community for Creative Non-violence*, ____ U.S. ____, 104 S.Ct. 3065 (1984) established that a government does have an interest in regulating where and under what conditions a person may sleep. The Fourth District Court, in rejecting this argument, stated that the facts of the instant case were dissimilar to those of *Clark vs. CCNV*, and therefore, that case did not apply. (A7)

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[2]The State Courts' concern stemmed from the fact that the word "parked" was not included in the ordinance. On petition for rehearing, the city strenuously argued that constitutional adjudication under the vagueness standard could be avoided if the State Court applied general standards of statutory construction; i.e. to interpret the ordinance so as to give effect to the legislative intent, as opposed to a literal application which results in absurd consequences (A6). The District Court rejected this argument, stating that the ordinance is "written so loosely it reasonably could be read, and was read as applying to a man napping in his automobile; who was not camping and is obviously not a latter day Okie" (A7). Accordingly, the ordinance was struck down under the vagueness doctrine without resort to applying standards of statutory interpretation.

On November 11, 1984, the City filed a petition for Writ of Certiorari with the Supreme Court of Florida. The federal claims raised in each of the lower State Courts were raised there.

The petition was denied on the 17 day of January, 1985.

REASONS FOR GRANTING THE WRIT

I.

This Case Should Be Reviewed Because It Presents The Question To What Extent A Municipal Government May Regulate The Conduct Of Its Citizens Under Its Police Power Before Such Regulation Becomes Overburdensome And Oppressive.

This case raises the important question whether a municipality may regulate essentially "innocent" conduct such as sleeping under its police power.

A. A municipality has a substantial governmental interest in regulating where a person may sleep.

In determining that an ordinance which prohibits any person from sleeping in a vehicle parked in a public street, public right-of-way or public parking lot is unconstitutionally overbroad, the state courts applied an incorrect standard. The gravamen of the constitutional question presented is whether a municipality may regulate where a person may sleep. This Court has answered in the affirmative.

Clark vs. Community for Creative Non-violence, ____ U.S. ____, 104 S.Ct. 3065 (1984) involved a national parks regulation prohibiting the erection of temporary structures in certain parks for the purpose of living activities "such as sleeping . . . ." 36 CFR 5019(e)(8). CCNV challenged the sleeping prohibition on first amendment grounds, contending that it prohibited part of a planned demonstration.[3] The ban on sleeping was upheld. Speaking for the Court, Justice White stated that

> [s]ymbolic expression of this kind (sleeping) may be forbidden or regulated *if the conduct itself may constitutionally be regulated* if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.

Id at ____, 104 S.Ct. at 3069 (parenthetical and emphasis added)

That is to say then, that sleeping in public parks is the type of conduct which may be constitutionally regulated because the government has a substantial asthetic interest in maintaining the beauty of its natural parks. Although that case was decided against the background of First Amendment expression, the underlying rationale is no less compelling in the instant case which involves a broader societal interest.

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[3]The demonstrators planned on sleeping in the tents to demonstrate the plight of the homeless.

The City of Pompano Beach is no less entitled to restrict persons from making their automobiles their homes, bedrooms or beds for asthetic reasons as well as to promote the health, safety and welfare of its citizens. If people want to sleep in their automobiles, they can do so in designated camping grounds or trailer parks. In recent years, South Florida has become inundated with an influx of homeless refugees who would be encouraged to camp in automobiles if there were no means of regulating such conduct. This presents a health hazard in addition to the detrimental effect it would have on the asthetic beauty of the city's streets and highways. Other considerations are that vehicles parked on the roadside without flashing emergency lights or warning signals create a dangerous obstacle to motorists traveling on the city's streets; and that people sleeping in their automobiles are prime targets for attackers who nefariously prey upon their vulnerability. These interests are substantial ones. The language of the ordinance is drawn as narrowly as possible to further the governmental interest in preventing the type of hazards mentioned above. The ordinance is neither overburdensome nor oppressive. Consequently, it does not suffer from unconstitutional overbreadth.

B. **An ordinance which gives fair notice of the type of conduct which is prohibited is not void for vagueness.**

The crucial ambiguity which the state courts determined invalidated the ordinance lies in the absence of the word "parked" in the ordinance. The vagueness standard, as enunciated in *United States vs. Harris*, 347 U.S. 612 (1954) is whether the language of the

legislative enactment in question "fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute". *Id.* at 617. From reading the ordinance as a whole, it is clear that the ban on sleeping in automobiles was meant to apply to parked vehicles only, not moving ones.[4] The ordinance sets out in ordinary terms, which an ordinary person exercising ordinary common sense can understand, a sufficiently definite warning that one may not park his vehicle on public property and sleep there.

There is no requirement that the ordinance must be drafted with absolute precision. The prohibition against excessive vagueness "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision", *Rose vs. Locke*, 423 U.S. 48, 49 (1975). The Due Process Clause requires only that the law give sufficient warning that people may conform their conduct "so as to avoid that which is forbidden". *Id.* at 50. The host of absurd consequences which may result from a literal application of the ordinance are not apropos to the situation at hand. A law will not be held unconstitutionally vague by the fact that its application may be uncertain in exceptional cases. *See, Hygrade Provision Company vs. Sherman*, 266 U.S. 497 (1925). Hence, the ordinance in question must be upheld as constitutional under the vagueness doctrine.

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[4]The respondent in the case *sub judice* was sleeping in an automobile parked in a public parking lot. There is no question that the respondent was in violation of the ordinance, which by its narrowest construction prohibits that behavior.

CONCLUSION

The State Court's ruling in this case must be reversed. The City of Pompano Beach has a right to determine what means it may resort to when protecting the health, safety and welfare of its citizens within constitutional standards. The decisions of the state courts impermissibly interfere with the City's responsibility and duty to its residents. The courts unnecessarily invaded the province of the legislature in the instant case by attacking the wisdom of the ordinance in question. The ordinance passes constitutional muster under the standards set forth by this Court with respect to the vagueness and overbreadth doctrines. It should not have been struck down as unconstitutional. Such a result surely warrants review by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this _____ day of _____, 1985 to BRUCE E. WAGNER, ESQUIRE, Attorney for Respondent, 1520 SE Third Avenue, Fort Lauderdale, Florida 33316; JAMES R. WOLF, ESQUIRE, General Counsel, Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida 32302; and JAMES K. GREEN, ESQUIRE, attorney for American Civil Liberties Union, 319 Clematis Street, West Palm Beach, Florida 33401.

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Appendix

SUPREME COURT OF FLORIDA
THURSDAY, JANUARY 17, 1985

CASE NO. 66,080

District Court of Appeal,
4th District – No. 82-2496

CITY OF POMPANO BEACH,
Petitioner,

v.

RICHARD MAYNARD CAPALBO,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.300(d).

BOYD, C.J., McDONALD, EHRLICH and SHAW, JJ., concur ADKINS, J., dissents

TC
cc: Hon. Clyde L. Heath, Clerk
Hon. Harry G. Hinckley, Jr., Judge
Hon. Robert E. Lockwood, Clerk

Philip J. Montante, Jr., Esquire
Dorothy V. Maier, Esquire
James R. Wolfe, Esquire
James K. Green, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court
by: /s/ Dulilue Causseaux
Deputy Clerk

CITY OF POMPANO BEACH,
Petitioner,

v.

Richard Maynard CAPALBO,
Respondent.

No. 82-2496.

District Court of Appeal of Florida,
Fourth District.

Aug. 7, 1984.

Rehearing Denied Sept. 26, 1984.

City petitioner for writ of certiorari to review decision of the Circuit Court for Broward County, Harry C. Hinckley, Jr., J., holding city's sleep-in-a-vehicle ordinance unconstitutional. The District Court of Appeal, Glickstein, J., held that the city ordinance was unconstitutionally vague and overbroad.

Writ denied.

Hurley J., filed dissenting opinion and also dissented from denial of rehearing.

1. **Municipal Corporations—122(2)**

Because municipal council, like legislature, would not knowingly enact unconstitutional measure, appellate courts will indulge every reasonable presumption in favor of ordinance's constitutionality.

2. Statutes—202

Operative language in statute may not be regarded as surplusage.

3. Automobiles—7

City sleep-in-a-vehicle ordinance was unconstitutionally vague and overbroad. U.S.C.A. Const.Amend 14.

4. Constitutional Law—82(4)

Penal statute that brings within its sweep conduct that cannot conceivably be criminal in purpose or effect cannot stand.

5. Constitutional Law—82(7)

Absent showing of compelling subordinating societal interest, city may not invade right of persons as against the government to be let alone.

On Motion For Rehearing

6. Constitutional Law—48(1)
Municipal Corporations—120

Whenever possible courts should, in preference to validating loosely written statute or ordinance, look to legislative intent of enactment, including legislative history, if possible, and construe enactment so as to bring it within constitutional bounds; court should not distill legislative intent from pure surmise.

7. Appeal and Error—830(1)

En banc consideration by District Court of Appeal on motion for rehearing was unwarranted where holding in matter did not directly conflict with other holdings of such Court.

Philip J. Montante, Jr., City Prosecutor, Pompano Beach, for petitioner.

Dorothy V. Maier of Wagner & Kollra, P.A., Fort Lauderdale, for respondent.

James R. Wolf, Tallahassee, as amicus curiae by Florida League of Cities, Inc., on behalf of petitioner.

James K. Green of Green, Eisenberg & Cohen, West Palm Beach, as amicus curiae by American Civil Liberties Union of Florida on behalf of respondent.

GLICKSTEIN, Judge.

On September 12, 1981, at approximately 2:55 a.m. a City of Pompano Beach police officer saw respondent Richard M. Capalbo sleeping in his automobile, which was parked in a city parking lot. Respondent was arrested and charged by information with violating City of Pompano Beach Municipal Code Section 31.66. This ordinance provides as follows:

> It shall be unlawful for any person to lodge or sleep in, on, or about any automobile, truck, camping or recreational vehicle or similar vehicle in any

public street, public way, right of way, parking lot or other public property, within limits of the city.

Prior to trial, respondent moved to dismiss on the grounds the subject ordinance was facially vague and overbroad and opened the door to arbitrary enforcement. The Broward County Court granted respondent's motion, holding the ordinance unconstitutional, and the circuit court affirmed. The circuit court held that while the ordinance was "not overly vague or ambiguous" it placed "too great a burden on our law enforcement officers and our citizens alike for uniform enforcement." Thereafter, the city petitioned this court for writ of certiorari.

Having considered the submissions of the parties, amicus curiae briefs of the Florida League of Cities and American Civil Liberties Union, and case authorities, we conclude the circuit court did not depart from the essential requirements of law in affirming the county court's decision. Section 31.66 is both unconstitutionally vague and overbroad.

[1, 2] Because a municipal council, like the legislature, would not knowingly enact an unconstitutional measure, appellate courts will indulge every reasonable presumption in favor of an ordinance's constitutionality. *Kass v. Lewin*, 104 So.2d 572 (Fla.1958). We would like, if we could, to accept the reasoning of our learned colleague's dissent, but we cannot. We agree with him that the subject ordinance would probably be constitutional if it proscribed only lodging in, on or about motor vehicles as further described in the ordinance. But the ordinance also proscribes sleeping in, on or about motor vehicles, employing the disjunction "or."

This language is the source of the ordinance's constitutional infirmity, as we adumbrate below. A maxim that carries as much weight as the presumption of an enactment's constitutionality cautions us that operative language may not be regarded as surplusage. Here we cannot disregard inclusion of the words "or sleeping" in the ordinance's statement of the acts it proscribes, and appellant was arrested for sleeping, not lodging, in his motor vehicle. A court is not a super-legislature that second guesses what a legislature really meant to say; the legislated language speaks for itself.

There is great similarity between the City of Pompano Beach sleep-in-a-vehicle ordinance and the St. Petersburg ordinance struck down in *State v. Penley*, 276 So.2d 180 (Fla. 2d DCA), *cert. denied*, 281 So.2d 504 (Fla.1973). The St. Petersburg ordinance provided that "[N]o person shall sleep upon or in any street, park, wharf or other public place." *Id.* at 180. The *Penley* court likened the St. Petersburg ordinance to vagrancy laws that draw no distinctions between conduct calculated to harm and conduct that is essentially innocent, *id.* at 181, and held the ordinance void for vagueness because, (1) in the words of *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989, 996 (1954), it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," 276 So.2d at 181; and (2) "the ordinance, as written, may result in arbitrary and erratic arrest and convictions. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110." 276 So.2d at 181.

In striking down an ordinance which prohibited loitering if it impeded or tended to impede passage, a sister court stated the constitutional criteria as follows:

> It is well settled that a law denies due process guaranteed by the Fourteenth Amendment of the United States Constitution if (1) it is so vague that a person of ordinary intelligence is not put on notice of the conduct which is prohibited, *State v. Buchanan*, Fla. 1966, 191 So.2d 33, 34; *Palmer v. City of Euclid*, 1971, 402 U.S. 554, 91 S.Ct. 1563, 29 L.Ed.2d 98; *Papachristou v. City of Jacksonville*, 1972, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110, or (2) if the law is so overbroad that it makes common conduct criminal and provides the police with unfettered discretion to arrest. *Headley v. Selkowitz*, Fla.1965, 171 So.2d 368; *State v. Penley*, Fla.App. 1973, 276 So.2d 180, 181; *Lanzetta v. New Jersey*, 1939, 306 U.S. 451, 453, 59 S.Ct. 618 [619], 83 L.Ed. 888.

Ciccarelli v. City of Key West, 321 So.2d 472, 473 (Fla. 3d DCA 1975). The United States Supreme Court has summed up the void-for-vagueness doctrine in similar language:

> It is settled that, as a matter of due process, a criminal statute that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954), or is so indefinite that "it encourages arbitrary and erratic arrests and convictions," *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92

S.Ct. 839, 843, 31 L.Ed.2d 110 (1972), is void for vagueness. See generally *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972). This appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights. *Id.*, at 109, 92 S.Ct., at 2299; 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974); *Keyishian v. Board of Regents*, 385 U.S. 589, 603-604, 87 S.Ct. 675, 683-684, 17 L.Ed.2d 629 (1967).

Colautti v. Franklin, 439 U.S. 379, 390-91, 99 S.Ct. 675, 683, 58 L.Ed.2d 596, 606 (1979). Moreover, in the recent case of *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S.Ct. 1855, 1858-59, 75 L.Ed.2d 903, 909-910 (1983), the Supreme Court has indicated that a statute that lends itsef to arbitrary enforcement can be void for vagueness even if it gives fair notice of what conduct it prohibits:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith, supra*, 415 U.S. at 574, 94 S.Ct., at 1247-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id., at 575, 94 S.Ct., at 1248. [Footnote omitted.]

The *Kolender* Court found unconstitutionally vague a California statute that failed to make clear what would constitute "credible and reliable" identification of persons stopped for loitering on the streets by a police officer who had articulable suspicion. *Id.* at 353, 103 S.Ct. at 1856, 75 L.Ed.2d at 906. This defect left the decision of whether or not to arrest to "the whim of any police officer." *Id.* 358, 103 S.Ct. at 1859, 75 L.Ed.2d at 910. The Court stated its holding "rests on our concern for arbitrary law enforcement and not on the concern for lack of actual notice." 461 U.S. at 358, 103 S.Ct. at 1859, 75 L.Ed.2d at 910.

[3] In the instant case, the subject ordinance gives ample notice of the conduct that is proscribed, yet is void for vagueness because it leaves in the unbridled discretion of the police officer whether or not to arrest one asleep in a motor vehicle on a public street or way or in a parking lot. A wide range of persons may violate the sleep-in-the-vehicle statute, from the tired child asleep in his car-seat while a parent drives or while the car is parked, to the alternate long-distance driver asleep in the bunk of a moving or parked tractor-trailer, to the tired or inebriated driver who has taken widely disseminated good counsel and chosen to go to sleep in his parked car rather than take his life or other's lives in his hands, to the latterday Okie who has made his jalopy his home. The officer encountering these varied situations is left free to decide for himself whether to enforce the ordinance.

[4, 5] On the basis of not dissimilar reasoning the ordinance is also unconstitutionally overbroad. By its language the ordinance criminalizes conduct which is

beyond the reach of the city's police power inasmuchas conduct "in no way impinges on the rights or interests of others." *Lazarus v. Faircloth*, 301 F.Supp. 266, 272 (S.D.Fla. 1969). Effective law enforcement does not require that citizens be at the "mercy of the officers' whim or caprice," *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879, 1890 (1949); and the just concerns of the public regarding crime must take rational expression and not become a mindless fear that erodes the rights of a free people, *Hayes v. Municipal Court of Oklahoma City*, 487 P.2d 974, 980 (Okla.Crim.App.1971). A penal statute that brings within its sweep conduct that cannot conceivably be criminal in purpose or effect cannot stand. Absent a showing of a compelling subordinating societal interest, the City may not thus invade the right of persons, "as against the government . . . to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Griswold v. Connecticut*, 381 U.S. 479, 494, 85 S.Ct. 1678, 1687, 14 L.Ed.2d 510, 521 (1965), Goldberg, J., concurring (citing *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956 (1928), Brandeis, J., dissenting). Surely the City could tailor an ordinance that fits more snugly the health, safety or aesthetic concerns it may have intended to address in enacting Section 31.-66.

Certiorari is denied.

HERSEY, J., concurs.

HURLEY, J., dissents with opinion.

HURLEY, Judge, dissenting.

I have a fundamental disagreement with the majority's approach to this case. It is axiomatic that courts are obliged to avoid constitutional rulings where a statutory ruling would suffice. *See Whalen v. United States*, 445 U.S. 684, 702, 100 S.Ct. 1432, 1443, 63 L.Ed.2d 715 (1980) (Rehnquist, J., dissenting); *Hagans v. Lavine*, 415 U.S. 528, 549, 94 S.Ct. 1372, 1385, 39 L.Ed.2d 577 (1974); *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Since there is an alternate and wholly satisfactory method for resolving the case at hand, I would not resort to constitutional adjudication.

The city council of Pompano Beach enacted ordinance 31.66 making it unlawful "for any person to lodge or sleep in . . . any automobile, truck, camping or recreational vehicle . . . in any public street, . . . parking lot or other public property, within the limits of the city." The majority opinion, focusing on the word "sleep," suggests a host of harsh, absurd consequences that will result from a literal application of the ordinance. Although this spotlight approach produces a dramatic effect, I do not think it justifies the majority's resort to constitutional adjudication. The better approach, it seems to me, lies in the application of traditional principles of statutory construction.

The ordinance, like any other legislative enactment, enjoys a presumption of validity. *State v. Sawyer*, 346 So.2d 1071 (Fla. 3d DCA), *cert. denied*, 353 So.2d 678 (Fla. 1977), *cert. denied*, 436 U.S. 914, 98 S.Ct. 2255, 56 L.Ed.2d 414 (1978); *see State v. McDonald*, 357 So.2d 405 (Fla. 1978). Where a literal interpretation of a statute leads to an absurd result, the strict letter of the law should yield to the obvious intent of the legislature.

Foley v. State ex rel. Gordon, 50 So.2d 179, 184 (Fla. 1951); *State ex rel. Register v. Safer*, 368 So.2d 620 624 (Fla. 1st DCA 1979). The latter rule is grounded in the maxim that "courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred." *City of St. Petersburg v. Siebold*, 48 So.2d 291, 294 (Fla. 1950). Finally, to determine legislative intent, a court should read the entire statute. *State v. Rodriquez*, 365 So.2d 157, 159 (Fla. 1978).

After reading the ordinance as a whole, one notes that the city council used the term "lodge," albeit in the disjunctive, with the term "sleep." This juxtaposition is significant for it provides a key to the council's intent. "Lodge" intimates a purposeful decision to establish living quarters. The encampment need not be permanent, but its duration is longer than that required for a casual nap, or a stop to relieve fatigue, sickness or other incapacitation. The term "lodge" also suggests the problem sought to be regulated by the ordinance. Most vehicles do not contain basic amenities or sanitation facilities. Unquestionable, municipalities have the right to exercise the police power to prevent people from residing in such "structures." *See e.g., Dennis v. City of Key West*, 381 So.2d 312 (Fla. 3d DCA), *petition for rev. dismissed*, 389 So.2d 1108 (Fla. 1980). Thus, I would limit the ordinance's application to *parked* vehicles. Furthermore, I would construe the ordinance to prohibit people, whether awake or asleep, from using their vehicle as a dwelling. To fall within this prohibition there must be evidence indicating an intent to reside in the vehicle.

As construed, the ordinance is neither vague nor overbroad. Thus, I would grant the petition for writ of

certiorari, reverse the decisions of the circuit court, sitting in its appellate capacity, and the county court and would remand for further proceedings consistent with this opinion.

ON MOTION FOR REHEARING

GLICKSTEIN, Judge.

[6] In moving for rehearing of *City of Pompano Beach v. Capalbo*, 455 So.2d 468 (Fla. 4th DCA 1984), the City correctly observes that wherever possible the court should, in preference to invalidating a loosely written statute or ordinance, look to the legislative intent of the enactment and construe the enactment so as to bring it within constitutional bounds. However, a court should not distill legislative intent from pure surmise. Thus, in *Parker v. State*, 406 So.2d 1089 (Fla. 1981)—a case cited by the City—the very language of the statute, and, more particularly, the title of the act under scrutiny, made the legislature's intentions clear. Another aid to construction of an enactment is often legislative history. In the instant case, however, source material from which the legislative intent of the subject ordinance could be reliably derived does not appear in the record.

The City contends that "or" in the ordinance's phrase "lodge or sleep" should be read in the conjunctive even though that preposition is ordinarily disjunctive. Then, reasoning from the fact Webster's Collegiate Dictionary states "sleep" is a synonym of "lodge," the City suggests use of the word "sleep" did nothing to the operative language of the ordinance, but is mere surplusage.

Concededly, there are circumstances in which legislative intent or context clues make clear that the conjunctive rather than the disjunctive was intended when "or" was used. No such indication was available here. As to the City's lexicographic argument, it is clearly mistaken. First, the City does not seem to realize that when Webster, in defining an entered word, prints a word in upper case (e.g., "SLEEP" in the entry for "lodge"), the word printed in upper case is a synonym rather than a definition. It is not necessary to dwell at length on the truism that synonyms are not frequently identical in meaning. We can attribute the English language's remarkable expressiveness in large measure to the fact that it contains great numbers of words that are similar in meaning, but each having its unique shading or nuance. Such words are synonyms.

Regardless of the definition the City quotes, "to lodge" denotes taking up temporary living quarters, which probably entails, but is by no means entirely congruent with, doing some sleeping; whereas "to sleep," when unqualified by modifiers or context, refers to being in the condition of physiological dormancy animals periodically experience. The dictionary thus furnishes no basis for doubting that use of the entire phrase "lodge or sleep" in the ordinance was quite intentional.

In the instant case, appellee was sleeping in his car, but he was not lodging there. Yet as the officer read the ordinance, Capalbo was in violation of it. Nor is there any available information to support the City's claim that the ordinance applies only to parked conveyances and not to moving ones.

The circuit court's determination that the City's ordinance is unconstitutional is not a departure from the essential requirements of law. Neither does the holding work any genuine hardship on the City, which can rehabilitate the ordinance by excising the words "or sleep," inserting the word "parked" where appropriate, and adequately specifying what conduct is prohibited. The latter may entail defining the word "lodge." A preamble expressing what interests the City seeks to protect by outlawing the stated conduct would enhance the ordinance's capacity to resist constitutional attack. By mentioning these possible changes we do not mean to imply making them would guarantee against constitutional infirmity.

To show that proscription of sleeping on or about public property is a valid governmental regulation, the City calls attention to the recent United States Supreme Court decision in *Clark v. Community For Creative Non-Violence*, ____ U.S. ____, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). In that opinion the Supreme Court held that governmental proscription of camping in temporary shelters erected on public park land adjacent to the White House did not violate freedom of expression under the First Amendment, but fell within the rubric of permissible regulation of time, place or manner. The subject matter of the instant case, both factually and legally, is hardly similar.

This court has not said the City of Pompano Beach may not by proscriptive ordinance prevent "latter day Okies" from camping on public ways, in parking lots, and the like. A problem with the ordinance that figured in this case was that it was written so loosely it reasonably could be read, and was read, as applying to a man

napping in his automobile, who was not camping and is obviously not a latter day Okie.

[7] The City has not brought to the court's attention pertinent law this court has overlooked or misapprehended. Additionally, because the holding in the instant case does not directly conflict with other holdings of this District Court, en banc consideration is unwarranted. Rehearing is denied.

HERSEY, J., concurs.

HURLEY, J., dissents with opinion.

HURLEY, Judge, dissenting.

I dissent for the reasons set forth in my dissent to the initial opinion.

MANDATE
FROM
THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

TO THE HONORABLE, THE JUDGES OF:
COUNTY COURT

GREETINGS:

WHEREAS, in that certain cause filed in this court styled:

CITY OF POMPANO

-vs-

RICHARD MAYNARD CAPALBO

Case No. 82-0035AC "Hinckley"

Your Case No. 81-3175MM20 "Nutaro"

The attached opinion was rendered on September 23, 1982

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the decision and judgement of this court, the rules of procedure and the laws of the State of Florida.

WITNESS the Honorable HARRY G. HINCKLEY, JR. Circuit Judge, and the seal of said court at Fort Lauderdale, Florida, on this date DECEMBER 6, 1982.

CC: PHILIP J. MONTANTE, Jr. P.A.
BRUCE E. WAGNER, ESQ.
COUNTY COURT (Original)

Robert E. Lockwood
Clerk of said Court

By: /s/ M. Anderson
Deputy

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA.

NO. 82-0035AC

CITY OF POMPANO BEACH,

Appellant,

vs.

RICHARD MAYNARD CAPALBO,

Appellee.

ORDER

BY ORDER OF THE COURT:

The able Trial Judge is hereby affirmed.

At issue was the constitutionality of Pompano Beach City Ordinance 31.66 which prevents any person from sleeping in a vehicle on any public street or property.

The ordinance itself is not overly vague or ambiguous as are most proscriptions: fair notice is given, to wit, "thou shalt not sleep in any vehicle which is on public property!" It is legal to peer, gaze, goggle, glare, ogle, meditate or even daydream — but no sleeping.

Common-sense signs and billboards along the highways telling drivers to pull off the road and take a nap, drink orange juice or coffee or use the next rest

stop provided by our federal, state or local government are all entrapments for the weary. If you have too much to drink, pull off to the side and take a sobering snooze, some invite. Is not sleep to the weary as much a necessity as food and water?

Cases on constitutionality of governmental prohibitions, pro and con, are cited by both counsel in this matter and this Court is grateful for their able research, however, it appears to be common sense that dictates that such an ordinance as is here dealt with is oppressive and arbitrary and leaves too great a burden on our law enforcement officers and our citizens alike for uniform enforcement.

Accordingly, the Trial Court is affirmed and Pompano Beach City Ordinance Sec. 31.66 is hereby declared to be unconstitutional.

DATED this 23rd day of September, 1982.

/s/ Harry G. Hinckley, Jr.
HARRY G. HINCKLEY, JR.
CIRCUIT JUDGE

Copies Furnished:

Philip J. Montante, Jr., P.A.
1500 East Atlantic Boulevard
Pompano Beach, Florida 33060

Bruce E. Wagner, P.A.
1520 Southeast Third Avenue
Fort Lauderdale, Florida 33316

/s/ Judge Nutaro

IN THE COUNTY COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO: 81-3175MM020

JUDGE: NUTARO

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD MAYNARD CAPALBO,

Defendant.

ORDER

THIS CAUSE having come to be heard on April 7, 1982, and the court having heard argument of counsel and being otherwise fully advised in the premises; it is hereby

ORDERED AND ADJUDGED that Section 31.66 of the Ordinances for the City of Pompano Beach is hereby declared to be unconstitutional on its face. This court adopts and incorporates herein by reference the Defendant's Motion to Dismiss and supporting Memorandum of Law submitted to this court on March 4, 1982.

DONE AND ORDERED in Chambers at Pompano, Broward County, Florida, this ____ day of APR 08 1982.

/s/ [illegible]
COUNTY COURT JUDGE

Copies furnished: DE
Bruce E. Wagner, Esq.
Attorney for Defendant

Philip J. Montante, Jr.
Attorney for the Plaintiff

IN THE COUNTY COURT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO: 81-3175MM020

JUDGE UNASSIGNED

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD MAYNARD CAPALBO,

Defendant,

DEFENDANT'S MOTION TO DISMISS COMPLAINT

COMES NOW the Defendant, RICHARD MAYNARD CAPALBO, by and through his undersigned counsel, and pursuant to Rule 3.190, Florida Rules of Criminal Procedure, moves to dismiss the Complaint in this cause. As grounds therefore, Defendant says that the ordinance under which he has been charged, deprived him of Due Process of Law, as guaranteed by the Constitutions of the United States and the State of Florida. Specifically, Defendant contends that the ordinance, Section 31.66, is unconstitutionally overbroad, vague and susceptible to arbitrary and selective enforcement.

MEMORANDUM OF LAW

Defendant was arrested, while asleep in his automobile, which was parked in a city parking lot. He

was charged pursuant to Pompano Beach City Ordinance Section 31.66, which provides:

> It shall be unlawful for any person to lodge or sleep in, or about any automobile, truck, camping or recreational vehicle or similar vehicle in any public street, public way, right-of-way, parking lot or other public property, within the limits of the City.

Under both State and Federal law, this statute must be sticken as both vague and overbroad, in violation of the constitutional guarantees of Due Process of Law.

A statute will be held to be void for vagueness if it fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute." *United States v. Harris*, 347 U.S. 612 (1953), or if it "encourages arbitrary and erratic arrests and convictions." *Thornhill v. Alabama*, 310 U.S. 88 (1939). Due process requires that an individual be on notice that his conduct can result in the conviction of a criminal offense. The standard for determining whether a statutory provision affords such notice was set forth in *Connally v. General Construction Company*, 269 U.S. 385 (1926):

> . . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

The state cannot require obedience to a rule or standard which is "so vague and indefinite as really to be no rule

or standard at all." *Small v. American Sugar Refining Company*, 267 U.S. 233 (1925). Section 1658(a) offers very few clues as to the conduct it proscribes, and cannot stand under any test of fair notice.

The courts have stricken vague statutes for an additional reason: they result in selective arrests and prosecutions. As the court stated in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972):

> where . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.

There can be no question that the ordinance with which the Defendant was charges is one which is selectively enforced. For example, one police officer might deem it commendable that a person feeling too tired or unwell to drive pulled over to the side of the road to rest until such time as he felt able to drive safely. Another officer might arrest that same person for violation of Section 31.66. Similarly, it would be unthinkable for an officer to arrest a child napping in the back seat of an automobile while his parents were parked by the ocean, watching the boats and the swimmers. Yet an adult might be arrested under identical circumstances. Finally, a citizen could be forced to choose between violation of City ordinance and conflicting State law, such as that which prohibits driving under the influence.

There are no standard or guidelines built into the ordinance which constrain the discretion of the police officer in selecting when the ordinance is to be enforced.

Absent such guidelines, the ordinance is to be enforced. Absent such guidelines, the ordinance must fall. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979).

The concept of overbreadth or overinclusiveness is closely related to the doctrine of vagueness. Statutory language which fails to give adequate notice of the conduct proscribed will often encompass conduct which is lawful. Once the lines between lawful and unlawful conduct are blurred, citizens are subject to prosecution, not for transgressing a particular law, but for transgressing no specific conduct at all. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1971), *Smith v. Goguen*, 415 U.S. 556, 518 (1973). Further, even a statute not void for vagueness may be unconstitutionally overbroad. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned, supra*, at 114. It is for these reasons that criminal statutes must be strictly construed and any ambiguity must be resolved in favor of leniency. *United States v. Enmons*, 410 U.S. 396, 411 (1972).

The Court should find Section 31.66 unconstitutionally overbroad on its fact, as the terminology employed in the statute is so broad that it reaches conduct which is clearly inoffensive. The Second District Court of Appeals held unconstitutional a nearly identical Saint Petersburg ordinance in *State v. Penley*, 276 So.2d 180 (Fla. App. 1973). The ordinance in question provided that "no person shall sleep upon or in any street, park, wharf or other public place." The Defendant in *Pendley* was arrested when police found him asleep or on a park bench at 4:15 A.M. The trial court found the defendant's arrest to be unlawful, on the ground that any enforcement

of this ordinance of necessity, would be arbitrary and capricious.

In upholding the decision of the lower Court, the Second District stated:

> We find that there is marked similarity between this ordinance and most vagrancy legislation in that both provide for punishment of unoffending behavior. This court, therefore, adopts the reasoning in *Lazarus v. Faircloth*, S.D. Fla. 1969, 301 F.Supp. 266, in holding that the ordinance here under scrutiny draws no distinction between conduct that is calculated to harm and that which is essentially innocent. *See, also, Smith v. Florida*, 405 U.S. 172, 92 S.Ct. 848, 31 L.Ed.2d 122. We further hold that the ordinance is void due to its vagueness in that it " . . . fails to five a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute . . . " *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989. Further, the ordinance, as written, may result in arbitrary and erratic arrest and convictions. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110; *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066. It thus follows that appellee's arrest was unlawful. 276 So.2d at 181.

This analysis is equally applicable to the ordinance under consideration, and this Court should follow the ruling of the *Pendley* court.

In conclusion, then, because Section 31.66 gives rise to arbitrary and discriminatory enforcement, and because it prohibits inoffensive as well as offensive conduct, it is impermissibly vague and overbroad. The ordinance is unconstitutionally defective on its face, and as applied to the Defendant.

WHEREFORE, the Defendant respectfully requests that the Complaint in this cause be dismissed.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the City Prosecutor, Philp J. Montante, Jr., 1500 E. Atlantic Boulevard, Pompano Beach, Florida 33060, this 4th day of March, 1982.

Respectfully submitted,

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By /s/ Bruce E. Wagner
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